

SOAH DOCKET NO. 582-06-3270
TCEQ DOCKET NO. 2004-1663-PST-E

2006 DEC 27 PM 4:30

EXECUTIVE DIRECTOR OF
THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,

Petitioner

v.

MOHAMMAD ADIL AQIL

Respondent

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§

BEFORE THE CHIEF CLERK'S OFFICE

TEXAS COMMISSION ON

ENVIRONMENTAL QUALITY

**EXECUTIVE DIRECTOR'S EXCEPTIONS AND PROPOSED MODIFICATIONS TO
PROPOSAL FOR DECISION**

NOW COMES the Executive Director of the Texas Commission on Environmental Quality ("Commission" or "TCEQ") and hereby files these Exceptions and Proposed Modifications to the Administrative Law Judge's Proposal for Decision, pursuant to 30 TEX. ADMIN. CODE § 80.257.

I. Introduction

Mohammad Adil Aqil owns a convenience store located at 12609 Eastex Freeway, Houston, Harris County, Texas ("Mr. Aqil" or the "Facility"). Four (4) underground petroleum storage tanks are located at the Facility. Based on the evidence gathered by the TCEQ, the Executive Director (the "ED") brought an enforcement action against Mr. Aqil, seeking an administrative penalty for the violation alleged in the Executive Director's Fourth Amended Report and Petition ("EDFARP"). The alleged violation was that Mr. Aqil failed to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks ("USTs") at the Facility.

The State Office of Administrative hearings conducted an evidentiary hearing on November 7, 2006. At that hearing, the parties stipulated to the fact no financial assurance was in place on April 2, 2003 for the Facility, that Mr. Aqil owns the property, and that Mr. Aqil leases out the property for the operation of a convenience store with retail sales of gasoline from four USTs.

The Administrative Law Judge ("ALJ") found that Mr. Aqil committed the alleged violation and determined that the only remaining issue is the calculation of the penalty being sought by the ED. The ALJ concluded that the administrative penalty should be \$750 rather than the \$3,280.00 the ED seeks.

II. Exceptions

The ED agrees with and supports the adoption of several of the ALJ's findings and conclusions. Specifically, the ED agrees with the ALJ's determinations that Mr. Aqil committed the alleged violation by failing to maintain financial assurance for his UST system on April 2, 2003 and that Mr. Aqil subsequently corrected the violation.

The ED disagrees with the ALJ's recommendation that an administrative penalty of only \$750 be assessed against Mr. Aqil. The ED believes that the \$3,280 penalty recommended in the EDFARP is appropriate and justified.

A. Penalty Calculation – Violation Events and Number of Petroleum USTs

The ED disagrees with the ALJ's rejection of the ED's Base Penalty calculation. Specifically, the ALJ recommends that the Base Penalty be calculated as one violation event, or \$1,000, rather than quadrupling the Base Penalty based on the four USTs located at the Facility. While the ED agrees that the financial assurance requirement is not filed by individual tank, but is instead a single policy covering all the tanks in a particular UST system, and that the tank coverage requirements are not calculated on a per tank basis, the ED believes that credible evidence supports the quadrupling of the Base Penalty based on the four tanks.

First, the 2002 Penalty Policy states "[t]he number of violation events that will be assessed a penalty depends on the number of times the violation is observed, the specific requirement violated, the duration of the violation, **and other case information.**" [emphasis added]. The number of tanks at UST facilities constitutes "other case information" which the TCEQ may take into account when calculating the number of violation events. Tying the number events to the number of tanks is thus contemplated by the Penalty Policy and was properly applied by the ED.

Second, Ms. Teresa Nemec, a TCEQ financial analyst, testified that a typical financial assurance policy includes a schedule of tanks, which specifically identifies the number and the size of each covered tank. Ms. Nemec also indicated that the cost of maintaining financial assurance on USTs is proportional to the number of tanks being covered. Further, Ms. Nemec testified that when a tank owner registers the tanks with the TCEQ, the owner must list and identify each tank on the TCEQ registration form and that the TCEQ requires that all USTs be covered as part of protecting human health and the environment. Ms. Nemec's testimony shows that the identification and financial assurance coverage of individual tanks is an important part of the UST regulatory scheme.

Third, both Mike Limos, TCEQ Enforcement Coordinator, and Ms. Nemec, testified that the ED has connected the number of violation events to the number of tanks fairly, consistently, and uniformly in all enforcement cases.

Finally, Mr. Aqil did not contest the method of penalty calculation and offered no evidence into the record that contradicted the ED's penalty calculation.

1 Ms. Nemec testified that she has worked at the TCEQ for five years and has performed hundreds of financial reviews.

B. Penalty Calculation - June 24, 2003 Notice of Violation and 5% Penalty Enhancement

The ED disagrees with the ALJ's rejection of the ED's 5% penalty enhancement stemming from the June 24, 2003 written Notice of Violation ("NOV"). The ALJ states that because the June 24, 2003 NOV is based on the exact same violation for which the ED is currently enforcing against Mr. Aqil, it does not qualify as a prior act.

TCEQ rules clearly contemplate that all written notices of violation be considered in compliance history. 30 TEX. ADMIN. CODE § 60.1(c)(7) states that compliance history components include "[a]ll written notices of violation, including written notification of a violation from a regulated person, issued on or after September 1, 1999, except for those administratively determined to be without merit and specifying each violation of a state environmental law, regulation, permit, order, consent decree, or other requirement." Thus, based on the above language, the TCEQ has the authority to account for all NOVs issued within the appropriate time frame, even an NOV that is based on the same violation as is currently being enforced. Moreover, Mr. Aqil presented no evidence contradicting the penalty enhancement.

C. Penalty Calculation - The October 10, 2002 Notice of Violation and the 2% Penalty Enhancement

The ED disagrees with the ALJ's rejection of the ED's 2% penalty enhancement stemming from the October 10, 2002 written Notice of Violation ("NOV").² Mr. Limos testified that the penalty was enhanced by \$280 because of the two written Notices of Violation associated with Mr. Aqil and that this enhancement was properly calculated comported using TCEQ's compliance history rules, the TCEQ Penalty Policy, and the statutory factors. Mr. Aqil did not object to the admission of the October 10, 2002 NOV into the record, did not request additional testimony regarding the NOV, and did not offer any evidence against using the NOV as part of the penalty calculation.

The ALJ also states that the ED failed to prove how the October NOV addressed to another person other than Mr. Aqil applies to the instant enforcement case. TCEQ rules state that a compliance history classification attaches to the site at which violations took place anytime within the previous five years.³ Here, the October 10, 2002 NOV letter is addressed to the same address as the facility owned by Mr. Aqil and is based upon a violation that occurred within the required five year violation window. Again, Mr. Aqil did not offer any evidence contesting the use or validity of the October 10, 2002 NOV.

² ED Exhibit No. 11.

³ See 30 Tex. Admin. Code § 60.2(a)

III. Other Suggested Modifications

The Executive Director also suggests the following changes be made to the ALJ's Proposal For Decision and Order:

1. Change Paige Seidenberger's title from "TCEQ environmental investigator" to "TCEQ financial analyst" on page 3 of the ALJ's Proposal For Decision.
2. Change "July 12, 2006" to "July 13, 2006" in Findings of Fact No. 18 of the ALJ's proposed Order.
3. Add the citations 30 TEX. ADMIN. CODE §§ 1.12 and 80.6(b)(3) to Conclusion of Law No. 2 of the ALJ's proposed Order.

IV. Conclusion

The Executive Director respectfully requests that the Commission adopt the ALJ's Proposal for Decision and enter the Proposed Order with the changes requested by the Executive Director.

Executive Director's Exceptions to Proposal for Decision

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Respectfully Submitted,

Texas Commission on Environmental Quality

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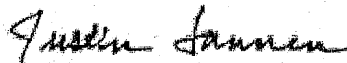
CERTIFICATE OF DELIVERY

I hereby certify on this 27th day of December, 2006, the original and 12 copies of the foregoing "Executive Director's Exceptions and Proposed Modification to the Proposal for Decision" ("Exceptions") were filed with the Chief Clerk of the Texas Commission on Environmental Quality, Austin, Texas.

I further certify that a copy of the Exceptions were sent via facsimile to ALJ Howard Seitzman with the State Office of Administrative Hearings at (512) 475-4994.

I further certify that on this day, a true and correct copy of the foregoing Exceptions were sent via fax to Mohammad Adil Aqil at (281) 873-6023.

I further certify that on this day a true and correct copy of the foregoing Exceptions were hand delivered to Blas Coy, Public Interest Counsel, Texas Commission on Environmental Quality, Austin, Texas.



Justin Lannen

Attorney

Litigation Division

Texas Commission on Environmental Quality

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

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CHIEF CLERKS OFFICE

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER

**Assessing Administrative Penalties Against
Mohammad Adil Aqil (Respondent);
TCEQ Docket No. 2004-1663-PST-E
SOAH Docket No. 582-06-3270**

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's Fourth Amended Report and Petition (Fourth Petition) recommending that the Commission enter an order assessing administrative penalties against Mohammad Adil Aqil (Respondent). A Proposal for Decision (PFD) was presented by Howard S. Seitzman, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted an evidentiary hearing concerning the Fourth Petition on November 7, 2006, in Austin, Texas.

The Executive Director, represented by Justin Lannen, appeared at the hearing. Respondent appeared *pro se* by telephone.

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Mohammad Adil Aqil (Respondent) owns the property at 12609 Eastex Freeway, Houston, Harris County, Texas (Facility)-upon which a convenience store operates with retail sales of gasoline.
2. Respondent purchased the Eastex Freeway property from Mohammed Jamal Aqil on August 1, 1996.
3. Respondent's address on the warranty deed was 1702 Kriswood Drive, Houston, Texas (Kriswood address).
4. Respondent leases the property to Mahmoud Al-Husainat.
5. Four underground storage tanks (USTs) are located at the Facility.
6. The USTs are not exempt or excluded from regulation under the TEX. WATER CODE ANN. or the rules of the Commission.
7. The USTs contain a regulated petroleum substance as defined in the rules of the Commission.
8. On April 2, 2003, Rob Norris, a TCEQ Senior Financial Analyst wrote to Aqil Mohammad Jamal/Attn. Mohammad Aqil in conjunction with a TCEQ evaluation of financial assurance compliance for petroleum USTs. The letter was mailed to the Kriswood address.
9. The letter requested that the owner or operator submit, within 30 days, a copy of the financial assurance mechanism which meets the regulatory requirements. Mr. Norris' request for documentation was a form letter mailed to all UST owners and operators and contained a warning that failure to timely respond with the appropriate documentation would result in a Notice of Violation.

10. On June 24, 2003, Mr. Norris signed a Notice of Violation addressed to Aqil Mohammad Jamal/Attn. Mohammad Aqil for failure to document compliance with financial assurance requirements for petroleum USTs. The letter was mailed to the Kriswood address.
11. On September 9, 2004, Mr. Norris signed a Notice of Enforcement addressed to Aqil Mohammad Jamal/Attn. Mohammad Aqil for violation of 30 TEX. ADMIN. CODE § 37.815. The letter was mailed to the Kriswood address.
12. Prior to April 2, 2003, the financial assurance requirements for the four petroleum USTs at the Facility were met by Mr. Husainat obtaining conforming liability insurance.
13. Conforming liability insurance was required on April 2, 2003.
14. No conforming liability insurance coverage was in place on April 2, 2003, and no approved alternate method of demonstrating financial assurance was proven by Respondent.
15. Conforming liability insurance was in place as of April 25, 2003.
16. On July 5, 2006, the Executive Director sent by certified mail, return receipt requested, and by first class mail, postage prepaid, a copy of the Third Amended Report and Petition (Third Petition) to Respondent at 12609 Eastex Freeway, Houston, Texas, and to Respondent at the Kriswood address.
17. The Third Petition recommended an administrative penalty of \$4,280.
18. On July 12 13, 2006, Respondent filed an answer and request for a hearing upon the Third Petition.
19. On August 14, 2006, the Executive Director requested the Commission's Chief Clerk refer the enforcement action to SOAH for a contested case hearing.

20. On August 23, 2006, the Commission's Chief Clerk referred this case to SOAH for a contested case hearing.
21. On August 29, 2006, the Commission's Chief Clerk mailed notice of the scheduled hearing to Respondent at both the 12609 Eastex Freeway address and the Kriswood address. The notice was sent by certified mail and by first class mail to Respondent. The notice of hearing:
- Indicated the time, date, place, and nature of the hearing;
 - Stated the legal authority and jurisdiction for the hearing;
 - Indicated the statutes and rules the Executive Director alleged Respondent violated;
 - Referred to the Third Petition, a copy of which was attached, which indicated the matters asserted by the Executive Director;
 - Advised the Respondent, in 12-point bold faced type, that the failure to appear at the preliminary hearing in person or by legal representation would result in the factual allegations contained in the notice and Third Petition being deemed as true and the relief sought in the notice possibly being granted in default; and
 - Included a copy of the Executive Director's penalty calculation worksheet, which alleged how the Commission should calculate a penalty for the alleged violations.
22. On September 20, 2006, the Executive Director and Respondent filed a Joint Motion to Waive Appearance at Preliminary Hearing (Joint Motion).
23. Pursuant to the Joint Motion, the September 21, 2006 Preliminary Hearing was not convened, four exhibits addressing jurisdiction and notice, including the Third Petition, were

admitted into evidence without objection, and the hearing on the merits was noticed for November 7, 2006.

24. On November 2, 2006, the Executive Director filed a Fourth Amended Report and Petition (Fourth Petition) recommending an administrative penalty of \$3,280.
25. The Fourth Petition alleges Respondent violated 30 TEX. ADMIN. CODE § 37.815(a) and (b) by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs at the Facility.
26. The administrative penalty sought in the Fourth Petition is based upon the Penalty Calculation Worksheet (PCW) generated on November 2, 2006.
27. The November 2, 2006 PCW is premised upon the TCEQ Enforcement Division's September 2002 Penalty Policy.
28. An evidentiary hearing convened at 10:00 A.M. on November 7, 2006. The Executive Director was represented by Justin Lannen, Litigation Division Attorney. Respondent appeared *pro se* by telephone.
29. During the hearing on the merits, the Executive Director was granted a trial amendment to his Fourth Petition to delete references to "d/b/a/ Owens Truck Stop" and to change Paragraph 4 by adding "or" as follows: "Mr. Aqil owns and/or operates a convenience store with retail sales of gasoline...."
30. The Executive Director was also granted leave, until November 10, 2006, to file an additional exhibit, a Notice of Violation used in the penalty calculation but not related to this alleged violation. The Executive Director filed his Motion to Admit Exhibit Into the Record

on November 10, 2006. Respondent had until noon on November 15, 2006, to object to the Notice of Violation and request additional testimony regarding the Notice of Violation. Respondent did not object to the Notice of Violation and did not request additional testimony regarding the Notice of Violation.

31. The October 10, 2002 Notice of Violation addressed to Mahmoud Al-Husainat was admitted into evidence as Exhibit ED-11 on November 16, 2006. The evidentiary record closed on November 16, 2006.

CONCLUSIONS OF LAW

1. For each violation of the TEX. WATER CODE ANN., and the rules adopted thereunder, the Commission may assess an administrative penalty of up to \$10,000 per day. TEX. WATER CODE ANN. § 7.051.
2. As required by TEX. WATER CODE ANN. § 7.055 and 30 TEX. ADMIN. CODE §§ 1.11, 112, 80.6(b)(3), and 70.104, Respondent was timely notified of the Third Petition and of the opportunity to request a hearing on the alleged violations or the penalties or corrective actions proposed therein.
3. Respondent was timely notified of the Fourth Petition and did not object to it as the operative pleading as it reduced by \$1,000 the administrative penalty sought by the Executive Director.
4. As required by TEX. GOV'T CODE ANN. § 2001.052, TEX. WATER CODE ANN. § 7.058, 1 TEX. ADMIN. CODE § 155.27, and 30 TEX. ADMIN. CODE §§ 1.11 and 39.25, Respondent was notified of the hearing on the alleged violations and the proposed penalty.

5. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
6. If the actual ownership of an underground storage tank system is uncertain, the fee simple owner of the surface estate of the tract on which the tank system is located is considered the owner unless proven otherwise. TEX. WATER CODE ANN. § 26.342(9).
7. Any person who holds legal possession or ownership of an interest in an underground storage tank system is an owner. 30 TEX. ADMIN. CODE § 334.2(73).
8. Respondent is the owner of the USTs at the Facility as defined in TEX. WATER CODE ANN. § 26.342(9) and 30 TEX. ADMIN. CODE § 334.2(73).
9. Respondent violated 30 TAC § 37.815(a) and (b) by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs at the Facility.
10. In determining the amount of an administrative penalty, TEX. WATER CODE ANN. § 7.053 requires the Commission to consider the following:
 - Its impact or potential impact on public health and safety, natural resources and their uses, and other persons;
 - The nature, circumstances, extent, duration, and gravity of the prohibited act;
 - The history and extent of previous violations by the violator;
 - The violator's degree of culpability, good faith, and economic benefit gained through the violation;

- The amount necessary to deter future violations; and
- Any other matters that justice may require.

11. The Penalty Policy effective September 1, 2002, is applicable.
12. Based on the factors set out in TEX. WATER CODE ANN. § 7.053, and the Penalty Policy effective September 1, 2002, an administrative penalty in the amount of ~~seven hundred fifty dollars (\$750.00)~~ three thousand two hundred eighty dollars (\$3,280) is justified, based on the following factors:

Violation (The base penalty was \$10,000)	Type	Harm	Events	Subtotal
Failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs at the Facility.	Programmatic	Major	+ 4	\$1,000 <u>\$4,000</u>
Adjustment - 25%	Good Faith Effort to Comply			(\$1000)
Adjustment for two written NOV's - 7%				\$280
Total				\$750 <u>\$3,280</u>

13. TEX. WATER CODE ANN. §§ 5.102 and 7.002 authorize the Commission to issue orders and make determinations necessary to effectuate the purposes of the statutes within its jurisdiction.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. Respondent is assessed an administrative penalty in the amount of ~~seven hundred fifty dollars (\$750.00)~~ three thousand two hundred eighty dollars (\$3,280) for violation of the Commission's rules.
2. The payment of this administrative penalty and Respondent's compliance with all the terms and conditions set forth in this Order completely resolve the matters set forth by this Order in this action.
3. The Commission shall not be restricted in any manner from requiring corrective actions or penalties for any other violations which are not raised here.
4. All checks submitted to pay the penalty imposed by this Order shall be made out to "The Texas Commission on Environmental Quality."
5. The administrative penalty assessed by this Order shall be paid within 30 days after the effective date of this Order and shall be sent with the notation "Re: Mohammad Adil Aqil; Docket No. 2004-1663-PST-E." to:

Financial Administration Division, Revenues Section
Attention: Cashier's Office, MC 214
Texas Commission on Environmental Quality
P.O. Box 13088
Austin, Texas 78711-3088
6. All relief not expressly granted in this order is denied.
7. The provisions of this Order shall apply to and be binding upon Respondent.

8. The Executive Director may grant an extension of any deadline in this Order or in any plan, report, or other document submitted pursuant to this Order, upon a written and substantiated showing of good cause. All requests for extensions by Respondent shall be made in writing to the Executive Director. Extensions are not effective until Respondent receives written approval from the Executive Director. The determination of what constitutes good cause rests solely with the Executive Director.
9. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to Respondent if the Executive Director determines that Respondent has not complied with one or more of the terms or conditions in this Order.
10. This Order shall expire five years from its effective date or upon compliance with all of the terms and conditions set forth in this Order, whichever is later.
11. The Chief Clerk shall provide a copy of this Order to each of the parties.
12. By law, the effective date of this Order shall be the date the Order is final, as provided by 30 TEX. ADMIN. CODE § 70.106(d) and 30 TEX. GOV'T. CODE ANN. § 2001.144.
13. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Kathleen Hartnett White, Chairman
For the Commission